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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ELEASAR AMBRIZ,

Defendant and Appellant.

B287939

(Los Angeles County  
Super. Ct. No. NA097579)

APPEAL from an order of the Superior Court of  
Los Angeles County, Richard A. Romero, Judge. Affirmed.

Law Offices of Anibal Valdez-Ortega and Anibal  
Valdez-Ortega for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant  
Attorney General, Steven D. Matthews and Christopher G.  
Sanchez, Deputy Attorneys General, for Plaintiff and  
Respondent.

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## INTRODUCTION

In 2014 Eleasar Ambriz pleaded no contest to possessing cocaine with the intent to sell, in violation of Health and Safety Code section 11351. He now appeals from the trial court's December 15, 2017 order denying his motion under Penal Code section 1473.7 to vacate that conviction.<sup>1</sup> We affirm.

## FACTUAL AND PROCEDURAL HISTORY

In 2013 the People charged Ambriz with one count of unlawful possession of cocaine with intent to sell (Health & Saf. Code, § 11351) and one count of unlawful possession of methamphetamine with intent to sell (*id.*, § 11378). In January 2014, pursuant to a negotiated disposition, Ambriz pleaded no contest to the cocaine charge, the court dismissed the other charge, and the court sentenced Ambriz to probation for three years. Before accepting Ambriz's no contest plea, the court advised him of the effects of the conviction including that if he was not a citizen of the United States, "a conviction of the offense for which [he had] been charged will have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The court found Ambriz knew and understood these consequences.

In October 2017, having completed his probation, Ambriz filed a motion under section 1473.7 to vacate his conviction. He contended his trial counsel had failed to advise him properly of the immigration consequences of his plea, specifically, that the conviction would subject Ambriz, who was born in Mexico and

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

was a legal permanent resident of the United States, to deportation and would make him ineligible for naturalization. Ambriz stated in his supporting declaration that he was currently in deportation proceedings as a result of the conviction.

The trial court held a hearing on the motion in November and December 2017. Ambriz testified that, prior to entering his plea, he informed his trial counsel of his immigration status. Ambriz stated his attorney informed him of the immigration consequences he faced, but she did not recommend he consult with an immigration attorney. Ambriz further testified that, after his trial counsel informed him of the immigration consequences he faced, Ambriz had only five minutes to decide how to plea. Had he had more time to decide, Ambriz stated, he would have spoken with an immigration lawyer. In his declaration supporting the motion, Ambriz also stated that, had he had more time to decide and an opportunity to consult with his wife, he “would have taken [his] case to trial . . . to avoid the negative and imminent immigration consequences.”<sup>2</sup>

An immigration attorney, Juan Carlos Pallares, also testified at the hearing on the motion. Asked what advice he would have given Ambriz before Ambriz entered a plea, Pallares stated: “The most important thing I would let him know is that he is deportable for the charges that were brought against him and to do his best with his criminal defense attorney to negotiate a plea that would not make him immediately deportable, and if not, if he has to face the charges, to go forward because a plea of no contest would—for immigration purposes—would be the same as if he was convicted by a jury.”

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<sup>2</sup> Ambriz tried to contact his former trial counsel to have her testify at the hearing, but could not reach her because she had retired.

The court denied the motion. The court found Ambriz did not prove by a preponderance of the evidence he “did not meaningfully understand the . . . adverse immigration consequences, potential and actual, of pleading guilty.” The court stated: “The court did advise him. He indicated he understood. The fact that [his trial counsel] may not have referred him to an immigration attorney does not establish by itself that there was no meaningful understanding by [Ambriz] of those consequences and he made a choice. Perhaps it was a bad choice, but it was a choice made with understanding of the consequences.” Ambriz timely appealed.

## DISCUSSION

### A. *Applicable Law and Standard of Review*

“[S]ection 1473.7 authorizes a ‘person no longer imprisoned or restrained’ to ‘prosecute a motion to vacate a conviction or sentence’ where the ‘conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.’ (§ 1473.7, subd. (a)(1).)<sup>[3]</sup> ‘The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in

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<sup>3</sup> Effective January 1, 2019, the Legislature amended section 1473.7, subdivision (a)(1), to provide that “[a] finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.” (Stats. 2018, ch. 825, § 2.) Neither party suggests the amendment has any application to this case.

subdivision (a).’ (§ 1473.7, subd. (e)(1).)” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*).)

“Ineffective assistance of counsel that damages a defendant’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance.” (*Ogunmowo, supra*, 23 Cal.App.5th at p. 75; accord, *People v. Espinoza* (2018) 27 Cal.App.5th 908, 914; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Where, as here, a defendant making a motion to vacate a conviction under section 1473.7 contends the conviction was legally invalid because trial counsel rendered ineffective assistance by giving incorrect advice about the immigration consequences of a guilty plea, we review a trial court’s order denying the motion de novo. (*People v. Tapia* (2018) 26 Cal.App.5th 942, 950 (*Tapia*); accord, *Ogunmowo, supra*, 23 Cal.App.5th at p. 76; see *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.) “We accord deference to the trial court’s factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel’s deficient performance and resulting prejudice to the defendant.” (*Tapia*, at p. 950; accord, *Ogunmowo*, at p. 76.)

B.     *The Trial Court Did Not Err in Denying Ambriz’s  
Motion To Vacate His Conviction*

Ambriz’s primary argument is not that his trial counsel provided ineffective assistance, but that the trial court evaluated his motion under the wrong statute. Citing the court’s observation that the sentencing court “did advise” Ambriz on the adverse immigration consequences of his plea, he contends the trial court mistakenly evaluated his motion under section 1016.5, which provides for vacating a conviction based on a plea of guilty or no contest where the sentencing court fails to properly advise a defendant of the possible immigration consequences of the plea,<sup>4</sup> instead of under section 1473.7.

But a sentencing court’s advisement regarding immigration consequences is relevant not only under section 1016.5, but also to a motion under section 1473.7. (See *Tapia, supra*, 26 Cal.App.5th at pp. 951-952 “[a]lthough the focus of [the defendant’s] motion is not the trial court’s advisement of immigration consequences, we address that advisement in the

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<sup>4</sup> “Section 1016.5, subdivision (a), requires a trial court, prior to accepting a guilty, nolo contendere or no contest plea, to administer the following advisement on the record: ‘If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.’ Section 1016.5 further provides, ‘If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have [adverse immigration] consequences . . . the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea . . . and enter a plea of not guilty.’” (*People v. Arendtsz* (2016) 247 Cal.App.4th 613, 616-617.)

context of assessing whether substantial evidence supports the trial court's finding [the defendant] was advised [by his counsel] of the actual immigration consequences before entering his plea"].) "One of the purposes of the section 1016.5 advisement is to enable the defendant to seek advice from counsel about the actual risk of adverse immigration consequences." (*People v. Patterson* (2017) 2 Cal.5th 885, 896.) Thus, an advisement by the sentencing court, where (as here) not followed by a request from the defendant for more time to consider his plea or confer with counsel, tends to show counsel adequately advised the defendant regarding immigration consequences. (See *Tapia*, at p. 579 ["[a]fter being specifically advised by the trial court his plea would lead to his deportation and denial of readmission to the United States, [the defendant] did not request more time to speak with counsel or further consider the appropriateness of entering a plea," but "affirmatively stated he understood this advisement from the trial court"].)<sup>5</sup> Thus, the trial court's reference here to the sentencing court's advisement does not establish the trial court applied the wrong statute. And nothing else about the trial court's ruling remotely suggests the court mistakenly considered Ambriz's motion under section 1016.5.

Ambriz suggests the trial court erred in not vacating his conviction under section 1473.7 because his trial counsel rendered ineffective assistance by not "properly advis[ing] [him] of the immigration consequences or in the alternative recommend[ing] that he seek an immigration attorney" before he

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<sup>5</sup> As we will discuss, the sentencing court's advisement regarding immigration consequences may also be relevant to determining whether any error claimed by the defendant was, as section 1473.7, subdivision (a)(1), requires, prejudicial.

entered his plea. Ambriz, however, has satisfied neither of the two requirements for showing ineffective assistance of counsel.

First, he has not demonstrated his counsel's performance was deficient. Ambriz testified that, prior to entering his plea, his trial counsel informed him "regarding the effect of the charges on [his] immigration status," but Ambriz did not say anything more about the specifics of what his trial counsel told him.<sup>6</sup> This was insufficient to meet Ambriz's burden of showing deficient performance by counsel. (See *People v. Datt* (2010) 185 Cal.App.4th 942, 952 [defendant must show "counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment"].) And even if his counsel did not recommend he speak with an immigration attorney and gave him only five minutes to decide how to plead, Ambriz cites no authority suggesting these actions constituted deficient performance—particularly where there is no evidence

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<sup>6</sup> Ambriz's testimony at the hearing was inconsistent on this point because he also stated, as he had in his declaration, that his counsel did not inform him that a conviction for the charges he faced would affect his immigration status. The trial court made an implicit finding these statements were not credible, and "we do not reevaluate witness credibility." (*Tapia, supra*, 26 Cal.App.5th at p. 953; see *ibid.* [upholding the "trial court's finding [the defendant] was advised of the specific immigration consequences of his plea and the effect the plea would have on his legal resident status" where "[t]he only evidence he was not advised of the specific immigration consequences of his plea is [his] own self-serving declaration, claiming he was not told of the immigration consequences"]; see also *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223-224 ["[a]n allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting appellant's claimed failures"].)



he expressed any lack of understanding about the immigration consequences of his plea or asked for more time to make a decision. (See *Tapia, supra*, 26 Cal.App.5th at p. 952.)

Second, Ambriz has not demonstrated that the purported deficiencies in counsel's performance prejudiced him. In his declaration in support of his motion and his testimony at the hearing on the motion, Ambriz maintained that, had his counsel advised him properly and given him more time, he would have consulted an immigration attorney, rejected the plea deal, and taken his case to trial. (See *Ogunmowo, supra*, 23 Cal.App.5th at p. 78 [“when a defendant claims that his counsel’s deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial””].) Without corroborating evidence, however, these statements did not establish prejudice. (See *People v. Martinez* (2013) 57 Cal.4th 555, 565 [“the court may reject an assertion that is not supported by an explanation or other corroborating circumstances”]; *In re Resendiz* (2001) 25 Cal.4th 230, 253 [“petitioner’s assertion he would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence’”], disapproved on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370; *Ogunmowo*, at p. 78 [“[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded,” and “[j]udges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences”].)

Pallares’s testimony added little to establish a reasonable probability Ambriz would have entered a different plea had he spoken with an immigration attorney. Before accepting his plea, the sentencing court advised Ambriz of what Pallares said was

the “most important thing” he would have told Ambriz, namely, that his conviction would result in deportation. And Pallares’s hypothetical advice that Ambriz should have rejected the plea deal in favor of going to trial because, either way, a conviction would be the same “for immigration purposes” ignores the fact that those purposes were not the only consideration bearing on Ambriz’s decision. Ambriz faced a maximum prison term of four years on the cocaine charge and three years on the methamphetamine charge; accepting the deal and pleading no contest meant receiving a sentence of probation. Indeed, that deal may in fact have served “immigration purposes.” (See *Tapia, supra*, 26 Cal.App.5th at p. 955 [“the plea bargain allowing for a quick release from custody to avoid any immigration holds also provided a better resolution for immigration purposes”].)

### **DISPOSITION**

The trial court’s order denying Ambriz’s motion to vacate his conviction is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.